Source: http://scc.lexum.umontreal.ca/en/2003/2003scc27/2003scc27.html

Z.I. Pompey Industrie *v.* ECU-Line N.V., [2003] 1 S.C.R. 450, 2003 SCC 27

ECU-Line N.V. *Appellant*

v.

Z.I. Pompey Industrie, Société lyonnaise de messageries nationales, John S. James Co., Polyfibron Technologies Inc., Ellehammer Packaging Inc., and all others having an interest in the cargo laden on board the M.V. "Canmar Fortune" *Respondents*

Indexed as: Z.I. Pompey Industrie *v.* ECU-Line N.V.

Neutral citation: 2003 SCC 27.

File No.: 28472.

2002: October 2; 2003: May 1.

Present: McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie and LeBel JJ.

on appeal from the federal court of appeal

Conflict of laws — Courts — Jurisdiction — Bills of lading — Forum selection clauses — Stay of proceedings — Arrangements made with appellant for carriage of cargo by sea — Respondents filing action against appellant in Federal Court alleging that cargo was damaged while in transit by rail — Appellant seeking stay of proceedings on basis that bill of lading contained forum selection clause giving courts in Antwerp, Belgium exclusive jurisdiction — Proper test for stay of proceedings to enforce forum selection clause in bill of lading — Whether "strong cause" test is proper test — Whether proper test should contemplate inquiry into whether there was fundamental breach or deviation — Federal Court Act, R.S.C. 1985, c. F-7, s. 50(1).

The respondents filed an action for damages against the appellant in the Federal Court, alleging that cargo was damaged while in transit by rail. Under the bill of lading Antwerp, Belgium was designated as the port of loading and Seattle was designated as the port of discharge. The cargo was transported from Antwerp to Montréal, where it was unloaded and carried by train to Seattle. The bill of lading contained a forum selection clause stating that "[t]he contract evidenced by or contained in this bill of Lading is governed by the law of Belgium, and any claim or dispute arising hereunder or in connection herewith shall be determined by the courts in Antwerp and no other Courts." The appellant brought a motion seeking a stay of proceedings on the basis that the bill of lading required disputes to be determined exclusively by the courts of Antwerp. A prothonotary denied the motion. The Federal Court, Trial Division dismissed the appellant's motion to set aside the prothonotary's order. The Federal Court of Appeal upheld the decision.

Held: The appeal should be allowed and a stay of proceedings issued in favour of the appellant.

In the absence of applicable legislation, such as s. 46(1) of the *Marine Liability Act*, the proper test for a stay of proceedings pursuant to s. 50 of the *Federal Court Act* to enforce a forum selection clause in a bill of lading is the "strong cause" test. Once a court is satisfied that a validly concluded bill of lading otherwise binds the parties, it must grant the stay unless the plaintiff can show sufficiently strong reasons to support the conclusion that it would not be reasonable or just in the circumstances to require the plaintiff to adhere to the terms of the clause. In exercising its discretion, the court should take into account all of the circumstances of the particular case. The tripartite test for interlocutory injunctions is an inappropriate test for a stay of proceedings to enforce a forum selection clause in a bill of lading. First, the tripartite test would render most forum selection clauses unenforceable, creating commercial uncertainty by unduly minimizing the importance of contractual undertakings. Second, the tripartite test is also problematic because the first part of the test requires the court to evaluate the likelihood of success on the merits of the case — which would be impossible because there is normally no determination on the merits. Finally, the tripartite test would make it difficult to establish irreparable harm in the context of a stay application based on a forum selection clause.

On an application for a stay to uphold a forum selection clause in a bill of lading, a court must not delve into whether one party has deviated from or fundamentally breached an otherwise validly formed contract. Such inquiries would render forum selection clauses illusory since most disputes will involve allegations which, if proved, will make the agreement terminable or voidable by the aggrieved party. Issues respecting an alleged fundamental breach of contract or deviation therefrom should generally be determined under the law and by the court chosen by the parties in the bill of lading. Once it is determined that the bill of lading binds the parties, the "strong cause" test constitutes an inquiry into questions such as the convenience of the parties, fairness between the parties and the interests of justice, not of the substantive legal issues underlying the dispute.

The decisions of the prothonotary, the motions judge and the Court of Appeal in this case are clearly wrong. The prothonotary, to the extent he applied the "tripartite test", erred in law, as did the Court of Appeal in concluding that the appropriate test for a stay of proceedings involving a bill of lading with a forum selection clause was the "tripartite test" for interlocutory injunctions. The "strong cause" test remains relevant and effective and no social, moral or economic changes justify the departure advanced by the Court of Appeal. Further, the prothonotary erred in law when he determined that the forum selection clause was void as a result of the alleged deviation stemming from the discharge of the cargo in Montréal. It is unnecessary to determine whether there has been a fundamental breach or deviation because the forum selection clause clearly covers such a dispute.

Cases Cited

Applied: *The "Eleftheria"*, [1969] 1 Lloyd's Rep. 237; **distinguished:** *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110; **considered:** *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423; **referred to:** *American Cyanamid Co. v. Ethicon Ltd.*, [1975] 1 All E.R. 504; *Captain v. Far Eastern SS. Co.* (1978), 7 B.C.L.R. 279; *Canada v. Aqua-Gem Investments Ltd.*, [1993] 2 F.C. 425; *Jian Sheng Co. v. Great Tempo S.A.*, [1998] 3 F.C. 418, leave to appeal refused, [1998] 3 S.C.R. vi; *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077; *Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of)*, [2001] 3 S.C.R. 907, 2001 SCC 90; *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897; *RJR—MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311; *The "Seapearl" v. Seven Seas Dry Cargo Shipping Corp.*, [1983] 2 F.C. 161; *Anraj Fish Products Industries Ltd. v. Hyundai Merchant Marine Co.* (2000), 262 N.R. 270; *Sarabia v. "Oceanic Mindoro" (The)* (1996), 26 B.C.L.R. (3d) 143, leave to appeal refused, [1997] 2 S.C.R. xiv; *Maritime Telegraph and Telephone Co. v. Pre Print Inc.* (1996), 131 D.L.R. (4th) 471; *Morrison v. Society of Lloyd's* (2000), 224 N.B.R. (2d) 1, leaves to appeal refused, [2000] 2 S.C.R. viii and xi; *Trendtex Trading Corp. v. Credit Suisse*, [1982] A.C. 679; *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972); *Advanced Cardiovascular Systems Inc. v. Universal Specialties Ltd.*, [1997] 1 N.Z.L.R. 186; *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991); *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995); *Mackender v. Feldia A.G.*, [1966] 3 All E.R. 847; *Fairfield v. Low* (1990), 71 O.R. (2d) 599; *Ash v. Lloyd's Corp.* (1992), 9 O.R. (3d) 755, leave to appeal refused, [1992] 3 S.C.R. v; *Drew Brown Ltd. v. The "Orient Trader"*, [1974] S.C.R. 1286; *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426; *Incremona-Salerno Marmi Affini Siciliani (I.S.M.A.S.) s.n.c. v. Ship Castor* (2002), 297 N.R. 151, 2002

FCA 479.

Statutes and Regulations Cited

Federal Court Act, R.S.C. 1985, c. F-7, s. 50(1).

Marine Liability Act, S.C. 2001, c. 6, s. 46(1).

Authors Cited

Michell, M. Paul. "Forum Selection Clauses and Fundamental Breach: *Z.I. Pompey Industrie v. ECU-Line N.V., The Canmar Fortune*" (2002), 36 *Can. Bus. L.J.* 453.

Peel, Edwin. "Exclusive jurisdiction agreements: purity and pragmatism in the conflict of laws", [1998] *L.M.C.L.Q.* 182.

Tetley, William. *Marine Cargo Claims*, 3rd ed. Montréal: Yvon Blais, 1988.

APPEAL from a judgment of the Federal Court of Appeal (2001), 268 N.R. 364, [2001] F.C.J. No. 96 (QL), dismissing an appeal from a decision of the Trial Division (1999), 182 F.T.R. 112, [1999] F.C.J. No. 2017 (QL), dismissing a motion to set aside the order of Prothonotary Hargrave denying a stay of proceedings (1999), 179 F.T.R. 254, [1999] F.C.J. No. 1584 (QL). Appeal allowed.

H. Peter Swanson, for the appellant.

George J. Pollack and *Jean-Marie Fontaine*, for the respondents.

The judgment of the Court was delivered by

1 BASTARACHE J. — The appellant submits that the appropriate test on a motion for a stay of proceedings to uphold a forum selection clause in a bill of lading is the "strong cause" test, as set out by Brandon J. in *The "Eleftheria"*, [1969] 1 Lloyd's Rep. 237 (Adm. Div.). The respondents, however, contend that the Federal Court of Appeal was correct in applying the tripartite test for interlocutory injunctions established in *American Cyanamid Co. v. Ethicon Ltd.*, [1975] 1 All E.R. 504 (H.L.). In my view, there is no legal or policy justification for setting aside the "strong cause" test in the context of a stay of proceedings to uphold a forum selection clause in a bill of lading. The dispute in this case arises under or in connection with the bill of lading. Its broad, unambiguous and unqualified forum selection clause was clearly intended to cover the dispute that gave rise to this appeal.

I. Facts

2 The respondent Polyfibron Technologies Inc. purchased a photo processor and four "sub-assemblies" located in France from the respondent Z.I. Pompey Industrie for resale to its customer, the respondent Ellehammer Packaging Inc. The cargo was to be delivered directly to Ellehammer in Seattle, Washington. Polyfibron retained the services of the respondent John S. James Co., a freight forwarder, to arrange for the importation of the cargo. John S. James Co., in turn, retained the services of the respondent Société lyonnaise de messageries nationales ("S.L.M.N. Shipping"), which made arrangements with ECU-Line France, a division of the appellant ECU-Line N.V., a Belgian company, for carriage of the cargo by sea.

3 The respondent John S. James Co. was aware that the cargo could not be transported by rail without there being a significant risk of it sustaining damage and communicated this fact to the respondent S.L.M.N. Shipping.

4 Under a clean on-board bill of lading executed at Lyon, France on January 23, 1997, the appellant was to carry the cargo from Antwerp, Belgium, to Seattle. The bill of lading designates John S. James Co. as the "consignee", Antwerp as the "port of loading", and Seattle as the "port of discharge". It bears the following forum selection clause:

> The contract evidenced by or contained in this bill of Lading is governed by the law of Belgium, and any claim or dispute arising hereunder or in connection herewith shall be determined by the courts in Antwerp and no other Courts.

The back of the bill of lading contains, among other provisions, the following clause:

12. METHODS AND ROUTE OF TRANSPORTATION

(1) The Carrier may ant [*sic*] any time and without notice to the Merchant: use any means of transport or storage whatsoever; load or carry the Goods on any vessel whether named on the front hereof or not; transfer the Goods from one conveyance to another including transshipping or carrying the same on another vessel than that named on the front hereof or by any other means of transport whatsoever; at any place unpack and remove Goods which have been stuffed in or on a Container and forward the same in any manner whatsoever; proceed at any speed and by any route in his discretion (whether or not the nearest or most or customary or advertised route) and proceed to or stay at any place whatsoever once or more often and in any order; load or unload the Goods from any conveyance at any place (whether or not the place is a port named on the front hereof as the intended Port of Loading or intended Port of Discharge); . . .

(2) The liberties set out in (1) above be [*sic*] invoked by the Carrier for any purposes whatsoever whether or not connected with the Carriage of the Goods. Anything done accordance [*sic*] with (1) above or any delay arising therfrom [*sic*] shall be deemed to be within the contractual Carriage and shall not be a deviation or whatsoever nature or degree.

5 The appellant transported the cargo from Antwerp to Montréal, where it was unloaded. From there the cargo was carried by train to Seattle. The respondents filed an action for damages of $60,761.74 in the Federal Court of Canada, alleging that the cargo was damaged while in transit by rail. The appellant denied the cargo had been damaged, arguing in the alternative that any damage had been caused by the respondents, third parties, or events for which it was not responsible. The appellant also brought a motion seeking a stay of proceedings on the basis that the bill of lading required disputes to be determined exclusively by the courts of Antwerp.

II. Relevant Statutory Provisions

6 The following statutory provisions are central to this appeal:

Federal Court Act, R.S.C. 1985, c. F-7

50. (1) The Court may, in its discretion, stay proceedings in any cause or matter,

(*a*) on the ground that the claim is being proceeded with in another court or jurisdiction; or

(*b*) where for any other reason it is in the interest of justice that the proceedings be stayed.

Marine Liability Act, S.C. 2001, c. 6

46. (1) If a contract for the carriage of goods by water to which the Hamburg Rules do not apply provides for the adjudication or arbitration of claims arising under the contract in a place other than Canada, a claimant may institute judicial or arbitral proceedings in a court or arbitral tribunal in Canada that would be competent to determine the claim if the contract had referred the claim to Canada, where

(*a*) the actual port of loading or discharge, or the intended port of loading or discharge under the contract, is in Canada;

(*b*) the person against whom the claim is made resides or has a place of business, branch or agency in Canada; or

(*c*) the contract was made in Canada.

III. Judicial History

A. *Federal Court of Canada, Trial Division* (1999), 179 F.T.R. 254

7 The appellant sought a stay of proceedings before the Federal Court, pursuant to s. 50 of the *Federal Court Act*, arguing that the courts of Antwerp were the proper jurisdiction to deal with any disputes arising from the bill of lading. The prothonotary held that the appellant had moved for a stay

within reasonable time given the implementation of new court rules and had therefore not attorned to its jurisdiction. The prothonotary accepted and applied the "strong cause" test as set out in the *The "Eleftheria"* characterizing its finding in the following way, at paras. 4-5:

> . . . I accept that ECU-Line prefers to litigate in a familiar jurisdiction and does not bring up the Antwerp jurisdiction merely to seek procedural advantage. Other factors favouring the upholding of the jurisdiction clause include reasonable connections with Belgium, Belgian and French witnesses, that any time bar which might preclude the plaintiffs from bringing their case in Antwerp has been waived, that no security has been posted and that enforcement of a Belgian judgment against the carrier, a Belgian company, should present no particular difficulties.
>
> I accept, from the Plaintiffs' point of view, that there will be Canadian and American witnesses, including from the American east-coast freight forwarder through whom the Plaintiff, Polyfibron Technologies Inc., arranged the carriage. Certainly the Tribunal of Commerce in [Antwerp], which would decide the case under the jurisdiction clause, conducts its proceedings in Flemish and decides cases on the basis of documents and statements, a procedure precluding witnesses and cross-examination. There may also be considerably more delay in most instances than in the Federal Court and all the more so in the case of an appeal. There are also some lesser factors which favour litigation in Vancouver.

The prothonotary concluded, at para. 5, that the factors raised by the respondents, while "substantial", were "just short [in this instance] of the strong case" which, by *The "Eleftheria"*, the respondents had to present in order to override the forum selection clause.

8 However, the prothonotary added that the respondents had presented a persuasive case that the bill of lading had come to an end in Montréal. For that reason, there was no forum selection clause to apply to the dispute. Notwithstanding clause 12 of the bill of lading, the prothonotary, relying on Professor W. Tetley's *Marine Cargo Claims* (3rd ed. 1988), accepted the presumption that a serious and willful breach or deviation of a contract of carriage may bring into question exclusion or limitation clauses in the contract. The prothonotary's response to the appellant's contention that issues of fundamental breach or deviation should be determined on the merits by the trial judge was the following, at para. 8 :

> The answer to this is not complex. An interim injunction, obtained on an interlocutory application, which requires a testing of the waters by looking at the strength of the case, the

harm being caused and the balance of convenience, is analogous to denial of a stay of the basis of a strong case that the jurisdiction clause is just not applicable. The interim injunction does not handicap the trial judge, nor should the denial of a stay on the basis that the jurisdiction clause is in all likelihood not available. Any prejudice to ECU-Line in having to litigate in Canada can be compensated by costs.

The prothonotary stated that it was common knowledge that rail carriage is usually accompanied by vibration, bumps and jolts, though considered this to be immaterial to the present case in which the intent to deviate was the sole issue. The prothonotary concluded that the appellant's deviation from the bill of lading was both unreasonable and voluntary. Relying on *Captain v. Far Eastern SS. Co.* (1978), 7 B.C.L.R. 279 (S.C.), the prothonotary concluded that there was no contract at the time the appellant discharged the cargo in Montréal and thus no forum selection clause upon which it could rely.

9 The motion for a stay of proceedings to uphold the forum selection clause was therefore denied.

B. *Federal Court of Canada, Trial Division* (1999), 182 F.T.R. 112

10 The court concluded that the prothonotary was obliged to take into account all the circumstances of the case in determining whether the respondent had demonstrated a "strong cause" in favour of denying a stay, pursuant to the test set out in *The "Eleftheria"*, an inquiry that did not preclude him from concluding that the bill of lading ended in Montréal and that its forum selection clause did not apply thereafter. The court added that in any event the appellant would have the opportunity to raise its arguments regarding the existence of the bill of lading and its forum selection clause before a trial judge.

11 The court dismissed with costs the motion to set aside the order of the prothonotary.

C. *Federal Court of Appeal* (2001), 268 N.R. 364

12 The Court of Appeal held that the test for reviewing decisions of a prothonotary is whether the prothonotary's exercise of discretion was clearly wrong and that the test for reviewing the exercise of discretion of a motions judge is whether sufficient weight was given to all relevant considerations.

13 The Court of Appeal concluded that *The "Eleftheria"* did not govern the case, stating, at para. 27:

> The burden of the appellant's submission is that when, as here, a contract contains a jurisdiction clause requiring that all disputes, wherever they arise, are to be dealt with by the Courts of a particular jurisdiction, Anglo-American and Anglo-Canadian jurisprudence both conclude that the dispute must be dealt with by the Courts of the jurisdiction the parties have agreed to. The appellant says that since *The Eleftheria* no case in Anglo-Canadian or Anglo-American jurisprudence has held otherwise. I disagree. *Jian Sheng Co.* [*v. Great Tempo S.A.*, [1998] 3 F.C. 418 (C.A.)] is a case where this Court held that a prothonotary was right to refuse a stay in circumstances where the appellant had not led sufficient evidence to support the existence of jurisdiction elsewhere than Canada.

14 The Court of Appeal emphasized *The "Eleftheria"* was decided in 1969 and the House of Lords had since decided *American Cyanamid*, *supra*, thereby relaxing the requirements for an interlocutory injunction to a tripartite test: first, a preliminary and tentative assessment of the merits of the case must show there is a serious issue to be tried; second, consideration must be given to whether the party seeking the interlocutory injunction would suffer irreparable harm unless the injunction is granted; and third, there must be a determination as to which party would suffer the greater harm as a result of the granting or refusing of an interlocutory injunction.

15 The Court of Appeal quoted with approval Beetz J., writing for a unanimous Supreme Court, in *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110, at p. 127:

> A stay of proceedings and an interlocutory injunction are remedies of the same nature. In the absence of a different test prescribed by statute, they have sufficient characteristics in common to be governed by the same rules and the courts have rightly tended to apply to the granting of interlocutory stay the principles which they follow with respect to interlocutory injunctions . . . .

The Court of Appeal reasoned that although the prothonotary had not referred to either *American*

Cyanamid or *Metropolitan Stores*, it was likely what he had in mind when he concluded, at para. 8:

> An interim injunction, obtained on an interlocutory application, which requires a testing of the waters by looking at the strength of the case, the harm being caused and the balance of convenience, is analogous to denial of a stay of the basis of a strong case that the jurisdiction clause is just not applicable.

The Court of Appeal concluded that given the evolution of English and Canadian jurisprudence, the proper test to apply in stay applications is the tripartite test employed for the purposes of obtaining interlocutory injunctions.

16 The Court of Appeal dismissed the appeal with costs.

IV. Issues

17 1. What is the proper test on a motion brought for a stay of proceedings to enforce the forum selection clause in a bill of lading?

2. Does that test contemplate an inquiry into whether there was a fundamental breach or deviation, or should such an inquiry be left to the decision maker in the agreed forum?

V. Analysis

18 Discretionary orders of prothonotaries ought to be disturbed by a motions judge only where (a) they are clearly wrong, in the sense that the exercise of discretion was based upon a wrong principle or a misapprehension of the facts, or (b) in making them, the prothonotary improperly exercised his or her discretion on a question vital to the final issue of the case: *Canada v. Aqua-Gem Investments Ltd.*, [1993] 2 F.C. 425 (C.A.), *per* MacGuigan J.A., at pp. 462-63. An appellate court may interfere with the decision of a motions judge where the motions judge had no grounds to interfere with the prothonotary's decision or, in the event such grounds existed, if the decision of the motions judge

was arrived at on a wrong basis or was plainly wrong: *Jian Sheng Co. v. Great Tempo S.A.*, [1998] 3 F.C. 418 (C.A.), *per* Décary J.A., at pp. 427-28, leave to appeal refused, [1998] 3 S.C.R. vi. For the reasons below, I conclude that the decisions of the prothonotary, the motions judge and the Court of Appeal are clearly wrong.

A. *Stays of Proceedings to Enforce a Forum Selection Clause*

19 Pursuant to s. 50(1) of the *Federal Court Act*, the court has the discretion to stay proceedings in any cause or matter on the ground that the claim is proceeding in another court or jurisdiction, or where, for any other reason, it is in the interest of justice that the proceedings be stayed. For some time, the exercise of this judicial discretion has been governed by the "strong cause" test when a party brings a motion for a stay of proceedings to enforce a forum selection clause in a bill of lading. Brandon J. set out the test as follows in *The "Eleftheria"*, at p. 242:

> (1) Where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign Court, and the defendants apply for a stay, the English Court, assuming the claim to be otherwise within the jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not. (2) The discretion should be exercised by granting a stay unless strong cause for not doing so is shown. (3) The burden of proving such strong cause is on the plaintiffs. (4) In exercising its discretion the Court should take into account all the circumstances of the particular case. (5) In particular, but without prejudice to (4), the following matters, where they arise, may be properly regarded: (a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign Courts. (b) Whether the law of the foreign Court applies and, if so, whether it differs from English law in any material respects. (c) With what country either party is connected, and how closely. (d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages. (e) Whether the plaintiffs would be prejudiced by having to sue in the foreign Court because they would (i) be deprived of security for that claim; (ii) be unable to enforce any judgment obtained; (iii) be faced with a time-bar not applicable in England; or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial.

20 Forum selection clauses are common components of international commercial transactions, and are particularly common in bills of lading. They have, in short, "been applied for ages in the industry and by the courts": Décary J.A. in *Jian Sheng*, *supra*, at para. 7. These clauses are generally to be encouraged by the courts as they create certainty and security in transaction, derivatives of order and fairness, which are critical components of private international law: La Forest J. in *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, at pp. 1096-97; *Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of)*, [2001] 3 S.C.R. 907, 2001 SCC 90, at paras. 71-72. The "strong

cause" test remains relevant and effective and no social, moral or economic changes justify the departure advanced by the Court of Appeal. In the context of international commerce, order and fairness have been achieved at least in part by application of the "strong cause" test. This test rightly imposes the burden on the plaintiff to satisfy the court that there is good reason it should not be bound by the forum selection clause. It is essential that courts give full weight to the desirability of holding contracting parties to their agreements. There is no reason to consider forum selection clauses to be non-responsibility clauses in disguise. In any event, the "strong cause" test provides sufficient leeway for judges to take improper motives into consideration in relevant cases and prevent defendants from relying on forum selection clauses to gain an unfair procedural advantage.

21 There is a similarity between the factors which are to be taken into account when considering an application for a stay based on a forum selection clause and those factors which are weighed by a court considering whether to stay proceedings in "ordinary" cases applying the *forum non conveniens* doctrine: E. Peel in "Exclusive jurisdiction agreements: purity and pragmatism in the conflict of laws", [1998] *L.M.C.L.Q.* 182, at pp. 189-90. The latter inquiry is well settled in Canada: *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897. In the latter inquiry, the burden is normally on the defendant to show why a stay should be granted, but the presence of a forum selection clause in the former is, in my view, sufficiently important to warrant a different test, one where the starting point is that parties should be held to their bargain, and where the plaintiff has the burden of showing why a stay should not be granted. I am not convinced that a unified approach to *forum non conveniens*, where a choice of jurisdiction clause constitutes but one factor to be considered, is preferable. As Peel, *supra*, notes, at p. 190, I fear that such an approach would not

> ensure that full weight is given to the jurisdiction clause since not only should the clause itself be taken into account, but also the effect which it has on the factors which are relevant to the determination of the natural forum. Factors which may otherwise be decisive may be less so if one takes into account that the parties agreed in advance to a hearing in a particular forum and must be deemed to have done so fully aware of the consequences which that might have on, for example, the transportation of witnesses and evidence, or compliance with foreign procedure etc.

In my view, a separate approach to applications for a stay of proceedings involving forum selection clauses in bills of lading ensures that these considerations are properly taken into account and that the parties' agreement is given effect in all but exceptional circumstances. See also M. P. Michell, "Forum Selection Clauses and Fundamental Breach: *Z.I. Pompey Industrie v. ECU-Line N.V., The Canmar Fortune*" (2002), 36 *Can. Bus. L.J.* 453, at pp. 471-72.

B. *The Inappropriateness of the Tripartite Test*

22 The respondents adopted the Court of Appeal's holding in favour of extending the tripartite test for interlocutory injunction to motions for a stay of proceedings to enforce a forum selection clause in a bill of lading. The tripartite test was set out as follows by this Court in *RJR—MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, at p. 334:

> First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits.

In support of the move to the tripartite test, the Court of Appeal quoted, at para. 29, with approval this Court's statement in *Metropolitan Stores*, at p. 127:

> A stay of proceedings and an interlocutory injunction are remedies of the same nature. In the absence of a different test prescribed by statute, they have sufficient characteristics in common to be governed by the same rules and the courts have rightly tended to apply to the granting of interlocutory stay the principles which they follow with respect to interlocutory injunctions.

While a stay of proceedings to enforce a forum selection clause may be of the same nature as an interlocutory injunction, I must respectfully disagree with the conclusion of the Court of Appeal.

23 The conclusion of the Court of Appeal is not supported by this Court's decision in *Metropolitan Stores*. The two main issues in that case were whether the Court of Appeal erred in failing to recognize a presumption of constitutional validity where legislation is challenged under the *Charter*, and what principles govern the exercise of a Superior Court judge's discretionary power to order a stay until the constitutionality of impugned legislation has been determined. The context of a constitutional challenge has little in common with the case at bar. Indeed, *Metropolitan Stores* did not involve forum selection clauses, and the underlying desirability of holding contracting parties to their bargain was not at issue. That case did not concern private international law; consequently, considerations of comity, uniformity of law, forum shopping and related issues were neither canvassed nor addressed by the Court.

24 As recently as 1998, Décary J.A., for a unanimous Federal Court of Appeal in *Jian Sheng*, confirmed at para. 10 the appropriateness of the "strong cause" test in Canada, a case in which the issue was whether the forum selection clause in a bill of lading was void for uncertainty:

> Where, in admiralty matters before this Court, a defendant applies for a stay pursuant to section 50 of the *Federal Court Act* . . . on the basis of a jurisdiction clause found in a bill of lading, the defendant has the burden of persuading the Court that the conditions of application of the clause have been met. Once the Court is satisfied that the clause applies, the burden of proof then shifts to the plaintiff to show sufficiently strong reasons to support the conclusion that it would not be reasonable or just in the circumstances to keep the plaintiff to the terms of the contract . . . . These "strong reasons" have been summarized in the often-quoted reasons of Brandon J. (as he then was) in *The "Eleftheria"* . . . .

In *Jian Sheng*, the forum selection clause contained in the bill of lading required the defendant to show it was the carrier and what was its principal place of business. *Jian Sheng* does not, as the Court of Appeal held in the case at bar, undermine in any way the "strong cause" test. Indeed, the tripartite test adopted by the Court of Appeal in this case constitutes a significant and unjustified departure from the jurisprudence not only of the Federal Court, but also of provincial courts, and those of other jurisdictions. See for instance: *The "Seapearl" v. Seven Seas Dry Cargo Shipping Corp.*, [1983] 2 F.C. 161 (C.A.), *per* Pratte J.A., at pp. 176-77, and *per* Lalande D.J., at p. 180; *Anraj Fish Products Industries Ltd. v. Hyundai Merchant Marine Co.* (2000), 262 N.R. 270 (F.C.A.), at para. 5; *Sarabia v. "Oceanic Mindoro" (The)* (1996), 26 B.C.L.R. (3d) 143 (C.A.), at paras. 37-38, leave to appeal refused, [1997] 2 S.C.R. xiv; *Maritime Telegraph and Telephone Co. v. Pre Print Inc.* (1996), 131 D.L.R. (4th) 471 (N.S.C.A.), at p. 483; *Morrison v. Society of Lloyd's* (2000), 224 N.B.R. (2d) 1 (C.A.), at para. 14, leaves to appeal refused, [2000] 2 S.C.R. viii and xi; *Trendtex Trading Corp. v. Credit Suisse*, [1982] A.C. 679 (H.L.); *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), at p. 15; *Advanced Cardiovascular Systems Inc. v. Universal Specialties Ltd.*, [1997] 1 N.Z.L.R. 186 (C.A.), at p. 190.

25 There are also compelling public policy reasons in favour of upholding the "strong cause" test. If the tripartite test were employed to deal with situations like the case at bar, most forum selection clauses would be rendered unenforceable, creating commercial uncertainty by unduly minimizing the importance of contractual undertakings. Instead of requiring a plaintiff to demonstrate a "strong cause" to not enforce a forum selection clause, the burden would be on the applicant to establish the elements of the tripartite test. The "strong cause" test rightly places the onus on the plaintiff who commences suit contrary to the terms of a forum selection clause.

26 Applying the tripartite test to a situation of this nature is also problematic because the first part of the test requires the court to evaluate the likelihood of success on the merits of the case. This

part of the test is designed to allow a motions judge the opportunity to deal with legal issues in preliminary proceedings without prejudice to the final adjudication of their merits. In the case of motions to stay proceedings based on a forum selection clause in a bill of lading, such a process would be impossible because there is normally no determination on the merits. Either the stay will be granted, and the proceedings in Canada will come to an end, or the stay will be denied and the defendant will have to defend the case on the merits in Canada, losing the benefit of the jurisdiction clause. For this reason the rule governing such stay applications cannot be based on a test that relies on the likelihood of success on the merits.

27 The test propounded by the Court of Appeal would make it difficult to establish harm in the context of a stay application based on a forum selection clause. Indeed, I can think of no instance where a defendant would suffer irreparable harm by being required to defend a lawsuit in a Canadian court. I am not satisfied that litigation costs disproportionate to the amount of the claim would constitute irreparable harm, as the respondents have argued. The "strong cause" test reflects the desirability that parties honour their contractual commitments and is consistent with the principles of order and fairness at the heart of private international law, as well as those of certainty and security of transaction at the heart of international commercial transactions. I see no reason to depart from the traditional approach for a stay of proceedings when the applicability of a forum selection clause is at issue. The Court of Appeal in effect read the choice of jurisdiction clause out of the contract. This approach is, in my view, untenable.

28 The respondents submit we ought to accord little weight to the forum selection clause in the bill of lading because bills of lading are, as a general rule, contracts of adhesion, devised unilaterally by the appellant. This submission is without merit despite the fact that bills of lading are often issued on pre-printed forms. See *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991), at pp. 593-94.

29 Bills of lading are typically entered into by sophisticated parties familiar with the negotiation of maritime shipping transactions who should, in normal circumstances, be held to their bargain. See *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995). The parties in this appeal are corporations with significant experience in international maritime commerce. The respondents were aware of industry practices and could have reasonably expected that the bill of lading would contain a forum selection clause. A forum selection clause could very well have been negotiated with the appellant, in light of the respondent John S. James Co.'s insistence that S.L.M.N. Shipping transport the cargo solely by sea. There is no evidence that this bill of lading is the result of grossly uneven bargaining power that would invalidate the forum selection clause contained therein.

C. *Fundamental Breach and Deviation*

30 Having concluded that the "strong cause" test governs whether to grant a stay in the

context of a bill of lading with a forum selection clause, I turn to whether, in taking into account all the circumstances of the particular case, the Court should consider issues arising under the contract. The respondents submit the Court should do just that, relying in part on the following passage from Professor Tetley in *Marine Cargo Claims*, *supra*, at p. 99:

> When however the breach is so serious, usually the result of a fraudulent or wilful act, the courts have questioned whether the carrier may rely on the terms of the contract or the law, and in particular, whether the carrier may rely on the exclusion or limitation clauses in the contract and the law because he has seemingly placed himself outside of the contract and the law.

In my view, the prothonotary erred in law when he determined the forum selection clause was void as a result of the alleged deviation stemming from the discharge of the cargo in Montréal.

31 Issues respecting an alleged fundamental breach of contract or deviation therefrom should generally be determined under the law and by the court chosen by the parties in the bill of lading. The "strong cause" test, once it is determined that the bill of lading otherwise binds the parties (for instance, that the bill of lading as it relates to jurisdiction does not offend public policy, was not the product of fraud or of grossly uneven bargaining positions), constitutes an inquiry into questions such as the convenience of the parties, fairness between the parties and the interests of justice, not of the substantive legal issues underlying the dispute. See *Mackender v. Feldia A.G.*, [1966] 3 All E.R. 847 (C.A.), *per* Lord Denning, at pp. 849-50, and *per* Lord Diplock, at p. 852. Put differently, a court, in the context of an application for a stay to uphold a forum selection clause in a bill of lading, must not delve into whether one party has deviated from, or fundamentally breached an otherwise validly formed contract. Such inquiries would render forum selection clauses illusory since most disputes will involve allegations which, if proved, will make the agreement terminable or voidable by the aggrieved party. Moreover, while the choice of forum for the determination of the existence of the agreement would be made without reference to the forum selection clause in the contract, if the agreement were found to remain intact, resort to the said clause would presumably be necessary to decide the appropriate forum in which to settle the rights of the parties under the agreement.

32 The position adopted by the Court of Appeal would remove many disputes from the reach of a widely framed forum selection clause by the mere allegation of various types of wrongful conduct. In my view, where, as here, the parties agree that claims or disputes arising under or in connection with a bill of lading are to "be determined by the courts in Antwerp and no other Courts", a proceeding in which one party contends that the other party deviated from the agreement such as to give the former the right to terminate or void the contract remains a proceeding in respect of a claim or dispute arising under or in connection with the bill of lading: *Fairfield v. Low* (1990), 71 O.R. (2d) 599 (H.C.), at pp. 605-8;

Ash v. of Lloyd's Corp. (1992), 9 O.R. (3d) 755 (C.A.), at p. 758, leave to appeal refused, [1992] 3 S.C.R. v; *Morrison*, *supra*, at paras. 13 and 19. See also *Drew Brown Ltd. v. The "Orient Trader"*, [1974] S.C.R. 1286, *per* Ritchie J., at p. 1288, and *per* Laskin J., at p. 1318, where an alleged deviation was found not to displace an otherwise valid choice of law clause.

33 The conclusion that allegations of deviation or fundamental breach are matters arising under the contract that should not be considered in determining whether to give effect to a forum selection clause is supported by the construction approach to fundamental breach considered by our Court in *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423, a case concerning the use of fundamental breach in the context of time limitation provisions. Discussing *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426 (a case involving fundamental breach in the context of clauses excluding liability), the Court said this, at para. 52:

> [W]hether fundamental breach prevents the breaching party from continuing to rely on an exclusion clause is a matter of construction rather than a rule of law. The only limitation placed upon enforcing the contract as written in the event of a fundamental breach would be to refuse to enforce an exclusion of liability in circumstances where to do so would be unconscionable, according to Dickson C.J., or unfair, unreasonable or otherwise contrary to public policy, according to Wilson J.

In my view, the policy rationale in support of the construction approach applied to exclusion and time limitation clauses is equally applicable to forum selection clauses in bills of lading.

34 In the case at bar, it is unnecessary to determine whether there has been a fundamental breach or deviation because the forum selection clause clearly covers such a dispute. The language of the clause is unambiguous and not subject to any qualifications, and the parties' bargain was not unconscionable or unreasonable. The clause becomes relevant precisely in disputes such as this one, as it regulates the way in which liability for deviation or breach of contract is to be established.

35 This approach is sound for policy reasons. Stay applications in the Federal Court should be brought quickly after commencement of the suit and consequently, the parties will have limited knowledge and information regarding the strength or weakness of their opponent's case. Issues regarding whether there has been, for instance, an unreasonable deviation raise complicated questions of fact that require a consideration of all the circumstances giving rise to the alleged deviation.

36 Given my conclusions, I do not consider it necessary to address the issue of the relationship between deviation and fundamental breach. Suffice it to say that, in this case, either allegation concerns a dispute arising under or in connection with the bill of lading. There is no need to consider the applicability of the doctrine of separability.

D. *Section 46 of the Marine Liability Act*

37 Section 46(1) of the *Marine Liability Act*, which entered into force on August 8, 2001, has the effect of removing from the Federal Court its discretion under s. 50 of the *Federal Court Act* to stay proceedings because of a forum selection clause where the requirements of s. 46(1)(*a*), (*b*), or (*c*) are met. This includes where the actual port of loading or discharge is in Canada. In this case, there would be no question that the Federal Court is an appropriate forum to hear the respondents' claim but for the fact that s. 46 does not apply to judicial proceedings commenced prior to its coming into force: *Incremona-Salerno Marmi Affini Siciliani (I.S.M.A.S.) s.n.c. v. Ship Castor* (2002), 297 N.R. 151, 2002 FCA 479, at paras. 13-24. Section 46 of the *Marine Liability Act* is therefore irrelevant in this appeal.

38 Indeed, s. 46(1) would appear to establish that, in select circumstances, Parliament has deemed it appropriate to limit the scope of forum selection clauses by facilitating the litigation in Canada of claims related to the carriage of goods by water having a minimum level of connection to this country. Such a legislative development does not, however, provide support for the fundamental jurisprudential shift made by the Court of Appeal in the case at bar. To the contrary, s. 46(1) indicates Parliament's intent to broaden the jurisdiction of the Federal Court only in very particular instances that can easily be ascertained by a prothonotary called upon to grant a stay of proceedings pursuant to the forum selection clause of a bill of lading. Section 46(1) in no way mandates a prothonotary to consider the merits of the case, an approach in line with the general objectives of certainty and efficiency, which underlie this area of the law.

E. *Application of the Law to the Facts of this Case*

39 I am of the view that, in the absence of applicable legislation, for instance s. 46(1) of the *Marine Liability Act*, the proper test for a stay of proceedings pursuant to s. 50 of the *Federal Court Act* to enforce a forum selection clause in a bill of lading remains as stated in *The "Eleftheria"*, which I restate in the following way. Once the court is satisfied that a validly concluded bill of lading otherwise binds the parties, the court must grant the stay unless the plaintiff can show sufficiently strong reasons to support the conclusion that it would not be reasonable or just in the circumstances to require the plaintiff to adhere to the terms of the clause. In exercising its discretion, the court should take into account all of the circumstances of the particular case. See *The "Eleftheria"*, at p. 242; *Amchem*, at pp. 915-22; *Holt Cargo*, at para. 91. Disputes arising under or in connection with a contract may not be regarded by a

court in determining whether "strong cause" has been shown that a stay should not be granted.

40 In this case, the bill of lading and its forum selection clause have been entered into and are otherwise binding on the parties. The prothonotary began by properly applying the "strong cause" test. In so doing the prothonotary weighed the fact that the appellant prefers to litigate in a familiar jurisdiction and does not bring up the jurisdiction clause merely to seek a procedural advantage; there are reasonable connections with Belgium; there are Belgian and French witnesses; any time bar which may preclude the respondents from bringing their case in Belgium has been waived; no security has been posted; and the enforcement of a Belgian judgment against the appellant should present no particular difficulties. The prothonotary also accepted the respondents' arguments that there will be Canadian and American witnesses in these proceedings; the Tribunal de commerce in Antwerp conducts its proceedings in Flemish and decides cases on the basis of documents and statements, a procedure precluding witnesses and cross-examination; and, there may be more delay in Belgium than in Canada, especially if there is an appeal. The prothonotary concluded that the factors in favour of denying a stay, while substantial, were just short of the "strong cause" test which the respondents had the burden of meeting. I see no reason why the prothonotary's conclusion on this point should be set aside. However, the prothonotary erred by subsequently turning his attention to a dispute arising under the bill of lading and in effect extending the tripartite test for interlocutory injunctions to motions for a stay of proceedings involving forum selection clauses contained in bills of lading.

VI. Disposition

41 The prothonotary, to the extent he applied the "tripartite test", erred in law, as did the Court of Appeal in concluding that the appropriate test for a stay of proceedings involving a bill of lading with a forum selection clause was the "tripartite test" for interlocutory injunctions. The "strong cause" test does not contemplate an inquiry into the question of establishing whether the surrounding contract is voidable. Such questions are best left to the decision maker in the forum agreed upon.

42 Accordingly, I would allow the appeal, overturn the judgments of the courts below, and issue a stay of proceedings in favour of the appellant, with costs throughout to the appellant.

Appeal allowed with costs.

Solicitors for the appellant: Bernard & Partners, Vancouver.

Solicitors for the respondents: Davies, Ward, Phillips and Vineberg, Montreal.